No. 88-1707

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN ZIMMERMANN,

Petitioner,

v.

BOARD OF PROFESSIONAL RESPONSIBILITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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QUESTION PRESENTED

Whether D.R. 7-107 of the Tennessee Code of Professional Responsibility violates the free speech clause of the first amendment of the Constitution of the United States when applied to punish a District Attorney for responding to press inquiries during two criminal cases in which he was acting as prosecutor with information already available to the public, there being no finding that the statements presented a clear and present danger to the fair trials or sentencing of the defendants.

The Supreme Court of Tennessee answered this question in the negative.

THE PARTIES

The names of the parties to the proceeding are contained in the caption. In addition, the National District Attorneys Association, The Tennessee District Attorneys General Conference and the Tennessee Association of Criminal Defense Lawyers filed briefs as amicus curiae.

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v.

BOARD OF PROFESSIONAL RESPONSIBILITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

John Zimmermann, the Petitioner, appeals from the final judgment of the Supreme Court of Tennessee, dated January 23, 1989, holding that D.R. 7-107 of the Tennessee Code of Professional Responsibility, as applied in this case does not violate Petitioner's right of free speech as guaranteed by the first amendment of the Constitution of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee, dated January 23, 1989, is reported at 764 S.W. 2d 757. It is reprinted in Appendix A hereto. The final judgment of the Chancery Court for Davidson County, Part III, in case No. 86-2120-III, dated May 28, 1987,

is not reported. It is reprinted in Appendix B. The judgment of the Hearing Committee of the Board of Professional Responsibility of the Supreme Court of Tennessee, dated August 22, 1986, is not reported. It is reprinted in Appendix C.

JURISDICTION

The judgment of the Supreme Court of Tennessee, upholding the constitutionality of D.R. 7-107 and affirming the judgment of the Chancery Court for Davidson County finding Petitioner to be in technical violation of Disciplinary Rule 7-107(B) and (E) and sustaining the verdict of the Hearing Panel of the Board of Professional Responsibility of the Supreme Court of Tennessee, was entered on January 23, 1989. (Appendix A).

This Petition is being docketed in this Court within ninety (90) days from the entry of the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND RULES

1. First Amendment, United States Constitution:

> Congress shall make no law*** abridging the freedom of speech***.

2. D.R. 7-107, Tennessee Code of Professional Responsibility:

> Trial Publicity

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of a public communication and that does more than state without elaboration:

(1) Information contained in public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter should not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the sentence or the merits of the case.

(C) D.R. 7-107(B) does not preclude a lawyer during such period from announcing:

(1) The name, age, residence, occupation, and family status of the accused.

(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(3) A request for assistance in obtaining evidence.

(4) The identity of the victim of the crime.

(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

(6) The identity of investigating and arresting officers or agencies and the length of investigation.

(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.

(8) The nature, substance, or text of the charge.

(9) Quotations from or references to public records of the court in the case.

(10) The scheduling or result of any step in the judicial proceedings.

(11) That the accused denies the charges made against him.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

(F) The foregoing provisions of D.R. 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent

and consistent with other law applicable to such proceedings.

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

(H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.

(5) Any other matter reasonably likely to interfere with a fair hearing.

(I) The foregoing provisions of D.R. 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(J) A lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under D.R. 7-107.

HOW THE FEDERAL QUESTION WAS RAISED

At every stage of the proceedings below, Petitioner presented, by brief and oral argument, the federal constitutional claim as stated in this Petition. The Hearing Panel rejected Petitioner's claim as follows:

> . . . several courts have held that the first amendment of the Constitution requires a more restrictive interpretation of D.R. 7-107 in order to adequately protect the right of free speech. Basically, those courts have adopted one of the three tests to be used in interpreting an attorney's extrajudicial com-

ments under D.R. 7-107. The three tests differ with regard to the degree of threatened harm required before discipline can be imposed:

(1) Whether the comments posed a "serious and eminent threat" to the fair trial of a defendant;

(2) Whether the comments posed a "clear and present danger" to the fair trial of a defendant;

(3) Whether the comments posed a "reasonable likelihood" of interfering with the fair trial of a defendant.

Until the Tennessee Supreme Court amends the language of D.R. 7-107 or furnishes other guidelines for interpreting its applicability to extrajudicial statements in criminal cases, the Hearing Committee must look to the present provisions of the rule and circumstances of each case. For the reasons stated herein, the Hearing Committee recommends a private reprimand in this case. (Appendix C, pp. 30a-31a).

The Chancery Court, on Appeal, found that "the Respondent's insistence that he is protected in making statements attributed to him by the first amendment to the Constitution is not tenable," (Appendix B, p. 22a). The Chancery Court further indicated that attorneys were not "aware of the definite impact of the rules" and recognized that direction from the Supreme Court was necessary to provide "complete understanding of what is to be expected of the parties," (Appendix B, p. 23a). The Tennessee Supreme

Court questioned "whether D.R. 7-107, as applied in the present case, violates the freedom of expression rights secured by the United States and Tennessee Constitutions" and answered "[w]e are of the opinion that it does not." (Appendix A, p. 7a). It thus considered and expressly rejected this federal constitutional claim.

STATEMENT OF THE CASE

Petitioner seeks review of the judgment of the Supreme Court of Tennessee upholding the constitutionality of D.R. 7-107 of the Tennessee Code of Professional Responsibility and affirming the judgment of the Chancery Court for Davidson County, finding Petitioner to be in technical violation of D.R. 7-107(B) and (E) and sustaining the verdict of the Hearing Panel of the Board of Professional Responsibility of the Supreme Court of Tennessee, Disciplinary District.

The Petitioner, John Zimmermann, is an Assistant District Attorney for the 20th Judicial District, Davidson County, Tennessee. In June of 1984, a preliminary hearing took place involving Larry Sheffield, a male prostitute, who confessed to the brutal first degree murder of a quadriplegic veteran in a Nashville cemetery. Immediately following the hearing, Zimmermann was confronted by reporters asking questions at which time several statements were attributed to him by the local newspapers. The only statements attributed to Zimmermann that discussed information not disclosed in the preliminary hearing concerned the findings of the Medical Examiner and photographs of the body. These were:

> "The Medical Examiner said (Campbell) was strangled, stabbed in the chest multiple times and had his throat slashed all the way across."
>
> "The photographs of the body were pretty bad. We are considering asking for the death penalty."

The cause of death was not a contested issue, nor was the Medical Examiner's description of the injuries disputed. The autopsy report is a public record under Tennessee law and had no bearing on the guilt or innocence of the defendant. The photographs in question were never displayed or offered to the media by Zimmermann and they were, therefore, not disseminated to the public.

Mr. Jim Weatherly, the Metro Nashville Public Defender, filed a complaint with the Tennessee Board of Professional Responsibility on July 5, 1984 contending that Zimmerman's statements made following Sheffield's preliminary hearing violated D.R. 7-107(B). Zimmermann filed a timely response.

In October of 1984, Dwayne Haynes and Richard Emmett were convicted in separate jury trials of assault with the intent to commit first degree murder, aggravated kidnapping, aggravated rape, armed robbery, and first degree burglary. The victim was an 82 year old senior citizen volunteer worker. After the jury trial and prior to the hearing before the sentencing judge, reporters questioned Zimmermann about both cases and attributed the following statements to him in a local newspaper:

> "I think these verdicts speak the mind of the jury for the community, in that crimes

> like this against the elderly are not going to be tolerated."
>
> ". . . will ask Judge Sterling Gray in a sentencing hearing . . . to impose the maximum sentences on Emmett and Haynes and to order those terms consecutive."
>
> "This woman suffered torture at the hands of these two men for about three hours. . . . As far as I am concerned, there is nothing worse they could have done short of killing her."

On March 26, 1985, Mr. Weatherly filed a second complaint with the Tennessee Board of Professional Responsibility contending that Zimmerman's statements made after the trial and prior to the sentencing hearing violated D.R. 7-107(E). Zimmermann filed another timely response.

The Disciplinary Board recommended a public censure against Zimmermann and he appealed, requesting a formal hearing before a three lawyer Hearing Panel for the Board of Professional Responsibility, pursuant to his rights under state procedural rules. In accordance with this request, the Board presented Zimmermann with a formal Petition for Discipline on December 5, 1985. He filed a timely answer on January 8, 1986. The matter came before the Hearing Panel on June 16, 1986.

District Attorney General Tom Shriver testified at the disciplinary hearing that it was the policy of his office to be open and candid with all members of the press within the permissible bounds of the disciplinary rules. Judge Sterling Gray testified at the disciplinary hearing that he was not aware of any extra-judicial statements made by Zimmerman and that he was not

influenced by anything said or done by him outside of the courtroom.

Although the Hearing Panel was uncertain of the constitutional standard to be applied to D.R. 7-107, it concluded in its August 22, 1968 judgment that Zimmermann violated D.R. 7-107(B) to a limited extent, and recommended that he receive a private reprimand only for the extrajudicial comments made in the Sheffield matter concerning the examination and report of the Medical Examiner and photographs of the body. The Hearing Panel found that the comments made in the Haynes matter prior to the sentencing hearing were not likely to affect the imposition of sentence in the case and therefore did not violate D.R. 7-107(E). Significantly, the Hearing Panel recognized that the overbreadth of D.R. 7-107(B) made it constitutionally suspect and requested guidance from the Tennessee Supreme Court so it could better determine when extrajudicial comments warranted discipline. (Appendix C, pp. 29a-31a).

Zimmerman appealed to the Chancery Court for Davidson County, Tennessee, Part III. Chancellor Designate, Aaron C. Brown, heard the appeal on April 1, 1987, and issued his finding on April 9, 1987. Even though the Chancellor was uncertain of the appropriate constitutional standard and asked the Tennessee Supreme Court to establish guidelines for the bench and bar as to when extrajudicial statements should be punished under the disciplinary rules, he confirmed the Hearing Panel's finding that a technical violation of D.R. 7-107(B) and (E) had occurred. (Appendix B).

Zimmerman appealed to the Supreme Court of Tennessee which issued a split opinion on January 23,

1989. Even though both the Hearing Panel and the Chancery Court found D.R. 7-107 unclear and constitutionally suspect and sought guidance from the Supreme Court of Tennessee, the majority opinion announced that "the rule is explicit."

While noting that courts in various jurisdictions have adopted different constitutional standards, the Tennessee Supreme Court reasoned that since the Rule itself makes reference to "the statements a 'reasonable person' might make, 'reasonably likely' to interfere with a fair trial," the rule should be interpreted to prohibit speech which is "reasonably likely" to interfere with or affect a fair trial. (Appendix A, p. 12a). Justice Frank F. Drowota, III sharply dissented from the decision finding that the disciplinary rule was overbroad under the first amendment to the United States Constitution. (Appendix A, p. 14a) He correctly pointed out that: (1) the citation to a "reasonable person" found in D.R. 7-107(A), (B), (D), (E), (G), and (H) has nothing to do with the extrajudicial statement of counsel but refers to what "a reasonable person would expect to be disseminated by means of public communication;" that (2) the "reasonable person" reference in D.R. 7-107(B) has nothing to do with giving guidance to the bar concerning extrajudicial statements made prior to trial; and that (3) "reasonably likely" is not found in D.R. 7-107(B) which is the relevant Section in this lawsuit; therefore, the Rule is not explicit. (Appendix A, pp. 19a-20a).

Justice Drowota also noted that the majority opinion creates a chilling effect on prosecutors and stifles the public's right to know. The bench and bar sought guidance from the Tennessee Supreme Court and re-

ceived none. Rather than refusing to provide guidelines, Justice Drowota urged the adoption of a standard which balances the rights of the accused to a fair trial with the right of a free press and the public's right to information and knowledge. Justice Drowota reasoned that the "clear and present danger" standard struck the proper balance among the prosecutor's right to speak, the right of the public and the press to have access to information, and the rights of the individual accused of a crime to a fair trial. (Appendix A, pp. 20a-21a).

The Hearing Committee, Chancery Court and Supreme Court all emphasized that Zimmermann did not intend to interfere with the fairness of the trial and sentencing hearing and that his desire to comply with the appropriate ethical standards was apparent.

REASON FOR GRANTING THE PETITION

This case presents a constitutional issue of fundamental importance to every practicing attorney in the nation on which the courts are in conflict: What may an attorney say without violating Disciplinary Rule 7-107? That is, what constitutional standard must be applied to D.R. 7-107 to properly balance an attorney's first amendment right to free speech and the public's right to information with a defendant's right to a fair trial?

1. *The Supreme Court of Tennessee, in this case, has departed from principles well established by the Supreme Court in the contempt by publication cases.*

The United States Supreme Court has consistently held that freedom of expression may be restricted only when, under certain circumstances, the speech poses a "clear and present danger" to an important

governmental interest. See *e.g., Wood v. Georgia*, 370 U.S. 875 (1962). The American Bar Association Committee on Standards for Criminal Justice has analyzed the "clear and present danger" standard in the fair trial-free press setting as follows:

> The clear and present danger test undeniably has had a checkered history in the Supreme Court. Two considerations, however, put this concern to rest. First, despite the fluctuations associated with the clear and present danger test in the national security cases, *there is at least one line of decisions in which it has been applied with consistency and with a sensitivity to the* first amendment *values that recommend it to the fair trial/free press setting: the contempt by publication cases* beginning with *Bridges v. California* [314 U.S. 252 (1941)]. Second, in any event, the clear and present danger test appears to have been revived in recent years, and in its revitalized form it embodies the elements of the four-step analysis. . . . ABA Standards for Criminal Justice, 2d Edition, Volume II 8-11 (emphasis added).

The four-step analysis asks the following questions: (1) Does the restriction advance a legitimate governmental interest? (2) Does the public comment pose an extremely serious threat to the governmental interest sought to be protected? (3) Does the threat appear likely to occur immediately? and (4) Is the restriction on public comment necessary to secure the protection or advancement of the governmental interest in jeopardy. *Id.* at 8-10. This four-step analysis is found in *Landmark Communications, Inc. v. Virginia*, 435 U.S.

829, 845, 56 L. Ed. 2d 1, 98 S.Ct. 1535 (1978), which reaffirmed the "clear and present danger" test as applied to the use of the contempt power to punish out-of-court statements. *See, e.g., Wood v. Georgia*, 370 U.S. 375, 8 L. Ed. 2d 569, 82 S.Ct. 1364 (1962); *Craig v. Harney*, 331 U.S. 367, 91, L. Ed. 1546, 67 S.Ct. 1249 (1947); *Pennekamp v. Florida*, 328 U.S. 331, 90 L. Ed. 1295, 66 S.Ct. 1029 (1946); and *Bridges v. California*, 314 U.S. 252, 86 L. Ed. 192, 62 S.Ct. 190 (1941). The issue in these cases had been solely whether a contempt citation could stand because of a clear and present danger that the comment in pending litigation imperiled impartial administration of justice. The working principal which emerged is that the substantive evil must be serious and the degree of imminence high before utterances can be punished. *See, also,* Strong, *Fifty Years of Clear and Present Danger: from Schenck to Brandenburg and Beyond*, Sup. Ct. Rev. 41 (1969).

The contempt by publication cases are similar to the instant case in that the basic concerns are fair trials, free speech, and the public's right to know. Petitioner is unaware of other applicable cases which have come before the United States Supreme Court except *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 2d 600 (1966), which adopts no standard. The Fourth Circuit, in *Hirschkop v. Snead*, 594 F. 2d 356 (4th Cir. 1979) *en banc*, concluded that *Sheppard v. Maxwell* signaled a departure by the United States Supreme Court from the "clear and present danger" test to a standard of whether a lawyer's comments are "reasonably likely" to endanger a fair trial. The Petitioner contends that this Court did not approve a shift from the "clear and present

danger" standard in *Sheppard v. Maxwell.* The majority opinion of the Tennessee Supreme Court is in direct conflict with this Court's decisions which have refused punishment and prior restraint unless the statements posed a "clear and present danger" to a legitimate government interest. Has the Supreme Court implicitly approved a shift from the clear and present danger standard in *Sheppard v. Maxwell*? If so, the standard is unclear as demonstrated by the conflict among the circuits and states.

2. *The decision of the Supreme Court of Tennessee in this case, holding that D.R. 7-107 is constitutional without application of any restrictive standard, is in conflict with the decision of Federal Circuit Courts and other State courts.*

Every court, except the Tennessee Supreme Court, which has been confronted with a challenge to a rule identical to D.R. 7-107 has held that the rule is overbroad under the first amendment. The courts are in conflict, however, as to the standard to be applied in limiting such statements so that the rule will pass muster under the first amendment. Most courts have opted for granting a standard to be applied in determining when such extrajudicial comments may be barred consistent with the first amendment. Those standards are as follows:

> (a) Whether the comments posed a "clear and present danger" to a fair trial;
>
> (b) Whether the comments posed a "serious and imminent threat" to a fair trial;
>
> (c) Whether the comments posed a "reasonable likelihood" of interfering with a fair trial.

In *Markfield v. The Association of Bar of City of New York*, 370 N.Y.S. 2d 82 (A.D. 1975) the court held that an attorney's extrajudicial statements may be punished only when those statements pose a clear and present danger to a fair trial. That standard has been applied by other courts regarding statements by attorneys and participants. See, *Bailey v. Systems Innovations, Inc.*, 852 F.2d 93 (3rd Cir. 1988); *Levine v. United States*, 764 F.2d 590 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158, 90 L.Ed.2d 719, 106 S.Ct. 2276 (1986); *United States v. Ford*, 830 F.2d 596 (6th Cir. 1987); *United States v. Lahder-Rivas*, 669 F.Supp. 1563 (M.D. Fla. 1987).

In the case of *Chicago Counsel of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. den.* 427 U.S. 912, the court held that a local federal rule, patterned after D.R. 7-107, was unconstitutionally overbroad under the first amendment. The court held that before a lawyer could be punished for extrajudicial statements a court must find that the lawyer's statements actually threatened the fair administration of justice by posing a "serious and imminent threat" to a fair trial, 522 F.2d at 242. The following courts have adopted the "serious and imminent threat" test to its disciplinary rules: *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980) *en banc*; *Ruggieri v. Johns-Manville Products Corp.*, 503 F.Supp. 1036 (D.R.I. 1980); *Shadid v. Jackson*, 521 F.Supp. 85 (E.D. Tex. 1981); *United States v. Garcia*, 456 F.Supp. 1354 (D.P.R. 1978); *In re Lasswell*, 673 P.2d 855 (Ore. 1983); *Kemner v. Monsanto Co.*, 112 Ill.2d 223, 492 N.E.2d 1327 (1986).

A minority of courts have held that while the rule is unconstitutionally overbroad, they would neverthe-

less graft a standard requiring a determination that the lawyer's statements posed a "reasonable likelihood" of interfering with a defendant's fair trial rights. See *Hirschkop v. Sneed*, 594 F.2d 356 (4th Cir. 1979) *en banc*: *In re Rachmiel*, 449 A.2d 505 (N.J. 1982). The *Hirschkop* minority, however, took issue with the "reasonable likelihood" standard and advocated the use of the "clear and present danger" test. *Id.* at 379. While the *Hirschkop* majority concluded that the "reasonable likelihood" standard was implicitly approved in *Sheppard v. Maxwell*, Judges Winter and Butzner opined that "it is unlikely that the Court implicitly approved a shift from the clear and present danger standard . . . to a reasonable likelihood standard . . . without ever commenting on the subject." *Id.* at 380.

The dissenting judges further observed that since D.R. 7-107 operates prospectively:

> When a lawyer speaks about a pending case, he frequently does not know how the case will develop, how his remarks will be interpreted and reported, how much community interest will arise, or what steps the trial judge will take to avoid prejudice. Therefore, a lawyer can only speculate whether his comments might later be judged to have created a reasonable likelihood of prejudice because of contingencies that he might not foresee. Under these circumstances, the prudent course is to avoid all comment . . . . *Threatened with professional disgrace, lawyers must restrict their speech "to that which is unquestionably safe." This sweeping proscription offends the first amendment. Id.* at 380,

quoting Baggett v. Bullit, 377 U.S. 360, 372 (1964) (emphasis added).

Another approach was taken by the Montana Supreme Court in the case of *In the Matter of Robert S. Keller*, 693 P.2d 1211 (Mont. 1984). The *Keller* court held that while the attorney's statements directly violated D.R. 7-107, the disciplinary rule itself failed to set forth any constitutional standards consistent with the first amendment. The Court dismissed the disciplinary action finding that under the first amendment the disciplinary rule was overbroad on its face, refusing to graft any constitutional standard into the rule.

In the instant case, the majority of the Tennessee Supreme Court rejected the urgings by the Hearing Committee and the trial judge, all of whom requested guidelines consistent with the first amendment. The majority stated: "We have no difficulty in finding adequate guidelines consistent within the context of the rule itself." (Appendix A, p. 12a). Justice Drowota pointed out in his sharp and vigorous dissent that this response was inadequate under the first amendment and that their reasoning was faulty. (Appendix A, p. 19a-21a). Justice Drowota asserted that the "clear and present danger" rule is the only constitutional standard which is consistent with the decisions of the United States Supreme Court:

> The bench and bar have asked for guidance in interpreting DR 7-107's applicability to extrajudicial statements. I am of the opinion that we should adopt a standard which balances the rights of the accused to a fair trial with the right of a free press and the public's right to information and knowledge.

> The majority opinion states "that it would be prudent for the District Attorney to review his 'open policy with the media' in relation to the nature of the comments his staff is encouraged to communicate." This reasoning by the majority is why I feel guidelines for DR 7-107(B) should be established by this Court. The majority opinion does what respondent seeks to avoid—a stifling of the public's right to know by creating a chilling effect on prosecutors with the suggestion to "review his 'open policy with the media'." There is a delicate balance between a prosecutor's right to speak and the right of the public and the press to have access to information, and the rights of the individual accused of a crime and a defendant's right to a fair trial. I am of the opinion that Zimmermann's statements should be reviewed by the test of "whether his comments posed a clear and present danger to the fair trial of the defendant." Under such a test, it is clear that Zimmermann's statements to the media did not pose a clear and present danger to the defendant's fair trial and he did not violate DR 7-107. (Appendix A, pp. 20a-21a).

The issue of gag orders and other prior restraints which the courts may impose upon attorneys and litigants continues to generate litigation. Courts are requesting guidance from the United States Supreme Court. See *Committee on Legal Ethics v. Douglas*, 370 S.E.2d 325 (W.Va. 1988) (noting the absence of guidance from the U.S. Supreme Court regarding the appropriate first amendment standard to be applied).

3. *Disciplinary Rule 7-107 should be governed by a national standard approved by this Court.* Attorneys' first amendment rights must be protected by this Court. Without a national standard, the States are free to impose what amounts to an absolute restriction of speech, as the Supreme Court of Tennessee has done in this case. In addition, it is not uncommon for attorneys to have a multi-state practice, but their first amendment rights should not fluctuate when they cross the state lines. Since each state now applies a different first amendment standard, attorneys are faced with needless uncertainty about their fundamental rights. This uncertainty mandates that attorneys remain silent or face considerable professional risks.

The commentators, while not in agreement on the appropriate standard to be applied to D.R. 7-107, all recognize the critical importance of attorneys' rights to free speech. The Reardon Report which gave rise to D.R. 7-107 recognized that freedom of speech and press are fundamental liberties guaranteed by the United States Constitution which must be zealously preserved. Advisory Committee on Fair Trial and Free Press, ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press, preamble (approved draft, 1968). The Goodwin Committee, later formed by the American Bar Association's Standing Committee on Association Standards for Criminal Justice to re-evaluate the attorney comment standards, first classified public comment about criminal proceedings as "pure speech" then declared that such comment "enjoys the strongest possible presumption of first amendment protections." ABA Standards for Criminal Justice, 2d Edition, Vol-

ume II 8-1.1, page 8-9. In 1980, the American Board Association's Commission on Evaluation of Professional Standards, known as the Kutak Commission, recommended substantial changes of D.R. 7-107 in light of *Hirschkop, Chicago Council of Lawyers* and the Goodwin Report. As a result, Model Rule 3.6 now incorporates a stricter standard of "substantial likelihood of materially prejudicing an adjudicative proceeding." The comment to Model Rule 3.6 states that:

> There are vital societal interests served by the free dissemination of information about events having legal consequence and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation of public policy.

The Kutak Commission notes that the Model Rule's "substantial likelihood" standard is an improvement over D.R. 7-107 because the Supreme Court has consistently invoked the "clear and present danger" standard to test the validity of suppressions of speech and that the Model Rule incorporates a standard approximating clear and present danger by focusing on the likelihood of injury and its substantiality. *See, Bridges v. California*, 314 U.S. 252, 273, 86 L. Ed. 192, 62 S.Ct. 190 (1941) ("Neither inherent tendency nor reasonable tendency is enough to justify a restriction of free expression."). Significantly, no Supreme Court decision has employed a "reasonable

likelihood" standard to test the validity of a content-based restriction of free speech. *Hirschkop*, 594 F.2d at 378-379; L. Tribe, *American Constitutional Law*, § 12-11 (1979).

Laurence Tribe, in his treatise *American Constitutional Law*, § 12-11, expressed the following concerns about rules which proscribe broad categories of statements:

> . . . restrictions of this kind are grossly overinclusive since the actual risk that a trial's result will be tainted by such publicity is slight. Only a small percentage of criminal cases ever reach a jury, most jury trials generate no publicity, and much crime news goes unnoticed. Moreover, mere exposure to the facts of a case, including prejudicial information, does not automatically disqualify a juror from rendering an impartial verdict, particularly if the prejudicial information is later admitted as evidence at trial.

The commentators' concern with overbroad restrictions on attorneys' speech is valid. The Supreme Court of Tennessee made no attempt to clarify which comments are permissible under D.R. 7-107. The majority opinion only advised that "it would be prudent for the District Attorney to review his 'open policy with the media' in relation to the nature of the comments his staff is encouraged to communicate." (Appendix A, p. 7a). Justice Drowota correctly states that the majority reasoning does what should be avoided, that is: "a stifling of the public's right to know by creating a chilling effect on prosecutors with the suggestion to "review his 'open policy with the media.' " (Ap-

pendix A, p. 20a). Thus, without Supreme Court intervention, attorneys' important first amendment rights are ignored.

The preceding discussion, the cases and the commentary show that the issues presented for review are far from settled. Attorneys are uncertain of their rights and in light of this uncertainty, it is fundamentally unfair to punish rather than guide them. Zimmermann represents lawyers as we hope them to be, in that he wants to do what is right, he had no intention of influencing the trial in an improper manner, and he believed as he spoke to the press that he was within the Rule. This case is an appropriate one in which to clarify the appropriate constitutional standard to be applied to D.R. 7-107. Until this Court imposes such a standard, the courts will remain in conflict and first amendment rights will vary from jurisdiction to jurisdiction.

CONCLUSION

For these reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted:

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APPENDIX

APPENDIX A

THE SUPREME COURT OF TENNESSEE AT NASHVILLE

S/C No. 87-47-I

IN RE: JOHN ZIMMERMANN,
An Attorney Licensed and Admitted to the Practice of Law in Tennessee,
Respondent/Appellant,

v

BOARD OF PROFESSIONAL RESPONSIBILITY-
Appellant.

For Publication
January 23, 1989

DAVIDSON COUNTY

Hon. Aaron Brown, Chancellor,

FOR RESPONDENT/ APPELLANT:

William M. Leech, Jr.
Corabel Alexander
WALLER, LANSDEN, DORTCH & DAVIS
Nashville, Tennessee

National District Attorneys Association and Tennessee Attorneys General Conference
Amici Curiae

FOR APPELLANT:

Joseph L. Mercer, II
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Harold Levinson,
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Nashville, Tennessee

Tennessee Assocation of Criminal Defense Lawyers
Amicus Curiae
Nashville, Tennessee

OPINION

JUDGMENT OF LOWER COURT AFFIRMED O'BRIEN, J.

There are appeals by each of the parties in this action which derives from a Board of Professional Responsibility petition for discipline against John Zimmermann who is a duly licensed and practicing attorney in the State of Tennessee. At the time these proceedings were initiated the respondent was a member of the staff of the District Attorney General for Davidson County. A complaint was received from the Metropolitan Public Defender charging that respondent had violated Disciplinary Rule 7-107(B). The petition for discipline requested the Board to appoint a hearing panel to hear testimony, receive evidence and make findings of facts and order disciplinary action as deemed appropriate. The specific charges filed against Zimmermann alleged that he had violated DR 7-107,(B) and (E), relating to trial publicity by talking to the press about pending proceedings. The first instance involved a defendant charged with murder. Immediately after a preliminary hearing he purportedly engaged in an informal conversation with members of the news media which was reported in the local newspapers on the following day. In the second complaint he allegedly had a second discussion with the press after two defendants charged in a six (6) count indictment had been convicted of the charges, but prior to their sentencing hearing.

The first statement admittedly made by respondent to the media occurred outside of the courtroom immediately after a preliminary hearing at which the defendant was arraigned. Respondent commented to the assembled reporters that "the medical examiner said [the victim] was strangled, stabbed in the chest multiple times and had his throat slashed all the way across. The photographs of the body were pretty bad. We are considering asking for the death penalty. The defendant said he stabbed the victim multiple times in the chest before slashing his throat, al-

most from ear to ear." In the second case in a similar conversation with the press he was reported to have commented on the extreme torture suffered by the victim at the hands of the defendants. He said, "the verdicts reflected the mind of the jury for the community that such crimes against the elderly would not be tolerated and that he would ask the sentencing judge to impose maximum sentences on both defendants."

The Hearing Committee heard testimony of witnesses, statements of respondent and arguments of counsel. They reviewed the exhibits, the record of the proceedings and briefs of counsel, then reported their conclusions and findings. They were of the opinion that, in the first case, respondent, John Zimmermann, had violated DR 7-107(B) and should receive a private reprimand for his extrajudicial comments made to representatives of the media concerning the examination and report of the medical examiner and photographs of the body, neither of which had been introduced at the preliminary hearing. They found that the defendant's confession had been introduced at the hearing, therefore it was a public record and respondent's comments in reference to it were permissible.

With respect to the other complaint they found that respondent's extrajudicial comments after the trial did not violate DR 7-107(E) because it was not reasonably likely his remarks would affect the imposition of sentence in that case.

They held that in applying the Rules of Professional Responsibility, there also must be a rule of reason applicable to their interpretation. There was no intent on the part of the respondent to interfere with a fair trial in the first case or influence the sentence to be imposed by the trial judge in the second. It was their conclusion he was following the policy of the office of the District Attorney General by being accessible to the news media. When respondent became aware that his extrajudicial comments

in the first case had become the subject of a complaint to the Board of Professional Responsibility he made no further statements to the press until after the end of the trial. In the second case he intentionally did not comment to the media until after the trial was over although the sentencing phase had not been held. It was their conclusion that it was his intent to conduct himself properly.

They further held that as a public prosecutor, respondent had certain rights and responsibilities concerning the dissemination of public information. However, the Disciplinary Rules adopted by the Tennessee Supreme Court place specific restrictions on all attorneys relative to the dissemination of information concerning pending criminal trials, which must be governed by the delicate balance between the right to a fair trial on one hand and the right of free expression on the other.

Each of the parties appealed the decision of the Hearing Committee to the Chancery Court. Disciplinary counsel on behalf of the Board of Professional Responsibility complained that the private reprimand of respondent was insufficient and inappropriate based upon the facts and the alleged violations on the first complaint. As to the second they were of the opinion that the Hearing Committee erred in finding that respondent did not violate the Code of Professional Responsibility.

The petition of respondent complained that the Hearing Committee erred in finding him in violation of DR 7-107(B) in reference to Complaint No. 1. As an affirmative defense he submitted that the Hearing Committee's interpretation of DR 7-107 violated his First Amendment rights in that the record failed to show that the comments made by him posed a clear and present danger; a serious and imminent threat; or a reasonable likelihood of interfering with a fair trial of the defendant in that case.

At the conclusion of the hearing in Chancery Court the trial judge entered written findings of fact with his con-

clusions that the respondent technically violated Disciplinary Rule 7-107(B)and (E) in the first complaint and also technically violated DR 7-107(E) involving the second complaint. He further found that respondent's insistence was untenable that he was protected by the First Amendment to the Constitution in making the statements attributed to him. That those statements, as printed, were violations of the Sixth and Fourteenth Amendment rights of the first defendant. In reference to the second case he concluded there was a technical violation of DR 7-107(E) but that the trial judge in that case was not aware of respondent's remarks and was not influenced by them in the sentencing proceedings.

The court was of the opinion that respondent did not act maliciously or with intent to interfere with a fair trial in reference to the first complaint, or to influence the trial judge in imposing sentence in reference to the second. He concluded that the evidence did not preponderate against the Hearing Committee's judgment in the matter and confirmed the findings of that forum in their entirety as to the discipline imposed.

Each of the parties have, in turn, appealed to this Court. Counsel for the Board of Professional Responsibility frames the issue around the appropriate sanctions to be imposed upon an Assistant District Attorney General who knowingly and intentionally violates the Code of Professional Responsibility, specifically Disciplinary Rule 7-107(B), by making improper statements to the news media after preliminary hearing and before trial of a sensational murder case.

Respondent, in his brief, inquires whether his extrajudicial statements to the press relating the medical examiner's findings violate the Disciplinary Rules. Whether the statements by the Hearing Committee as a violation of the Disciplinary Rules warrant *punitive* action. (Emphasis ours). Whether DR 7-107, as it is applied in the present

case, violates his freedom of expression rights secured by the United States and Tennessee Constitutions.

We point out that under Rule 9, § 1.3 of this Court, the review of the judgment of the Hearing Committee in the trial court is on the transcript of the evidence before that committee, its findings and judgment and upon such other proof as either party may desire to introduce. The trial judge is to weigh the evidence and determine the facts by the preponderance of the proof. The review in this Court is *de novo* upon the transcript of the record from the Circuit or Chancery Court, which shall include the transcript of evidence before the hearing committee. We must presume, however, that the trial court was correct unless the preponderance of the evidence is contrary to his finding. *Gillock v. Bd. of Prof. Resp. of the Supreme Court*, 656 S.W.2d 365, 367 (Tenn. 1983).

Disciplinary counsel acting for the Board of Professional Responsibility, ably assisted by counsel pro hac vice, insists that the severity or leniency of the sanction imposed, which is the basis for their appeal, is not an issue of fact. Therefore, this Court is not bound by the decision of the Chancery Court on that issue. It is urged that the judgment of that court should be modified to order a suspension from the practice of law against respondent. It is their position that the private reprimand directed by the hearing panel and the Chancery Court is too lenient and does not give sufficient warning to respondent and other attorneys of the serious nature of the misconduct and aggravating circumstances surrounding the charges made against Mr. Zimmermann.

The record before us contains a concurring finding of fact with the exception that the hearing committee found respondent had violated DR 7-107(B) while the chancellor concluded there was a technical violation of both Sections B and E. Notwithstanding the judgments below, upon determining the existence of aggravating or mitigating cir-

cumstances, this Court may modify the judgment of the trial court. *Disciplinary Board v. Banks,* 641 S.W.2d 501, 504 (Tenn.1982) However, we are reluctant to substitute our judgment for that of two separate triers of fact who have reviewed the proof and heard the evidence in personam. See *Disciplinary Counsel v. Fitzgerald,* 607 S.W.2d 232, 234 (Tenn.1980). We adopt the statement made by the Hearing Committee in their judgment. "In applying the Rules of Professional Responsibility, there also must be a rule of reason applicable to their interpretation." The record clearly supports the findings of the trial judge that respondent was in technical violation of Disciplinary Rule 7-107(B) and (E) but that his conduct in discussing trial matters with the news media was neither malicious nor with the intent to interfere with the right to a fair trial of any of the defendants. The discipline imposed was adequate and appropriate. We are of the opinion his comments were not very well considered and, in order to avoid the possibility of violating an accused's constitutional rights, that it would be prudent for the District Attorney to review his "open policy with the media" in relation to the nature of the comments his staff is encouraged to communicate.

Respondent has raised three issues for review, the first two of which we find it necessary to mention only in passing. We have previously discussed the Hearing Committee's conclusions that respondent's extrajudicial comments to representatives of the media concerning the examination and report of the medical examiner and photographs of the victim's body violated DR 7-107(B). The simple answer to his second complaint is that the purpose of sanctions under the Disciplinary Rules is to *discipline* and not to *punish.* The third inquiry, requires further amplification and consideration, that is whether DR 7-107, as applied in the present case, violates the freedom of expression rights secured by the United States and Tennessee Constitutions. We are of the opinion that it does not.

There are two specific, though divergent, reasons why the strictures against trial publicity imposed by the Disciplinary Rules are not violative of an attorney's freedom of expression rights. In the case of *In Re, Rachmiel,* 449 A.2d 505 (N.J. 1982), under strikingly similar circumstances, the New Jersey Supreme Court held that the application of a disciplinary rule which proscribed attorneys involved in criminal cases from making statements that relate to "any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case" . . . did not constitute a violation of the Right to Free Speech under the First Amendment. In that case a former prosecutor, after he had returned to private practice, made comments concerning a criminal case which he had previously handled. A complaint was filed by the county prosecutor with the District Ethics Committee. The committee issued a formal complaint against *Rachmiel* and held hearings. A presentment was filed charging him, inter alia, with violation of DR 7-107(B) and (E).[1] The New Jersey Court, citing appropriate authorities, held:

> "In determining the validity of restrictions upon free speech, the constitutional analysis calls for the application of two demanding tests. The first is whether a substantial governmental interest is furthered by the restriction upon speech. (Citation omitted). The second requires that the restriction be no greater than is necessary or essential to protect the governmental interest involved. The application of these tests involves a balancing of the gravity and likelihood of the harm that would result from unfettered speech against the degree to which free speech would be inhibited if the restriction is applied. (Citations omitted). . . . [T]he restriction upon free speech

[1] The New Jersey rule is identical to Tennessee Supreme Court Rule 9.

> imposed by the Disciplinary Rule addresses a substantial governmental interest. That interest relates to the fairness and integrity of the administration of justice and becomes particularly compelling in the administration of the criminal justice system. (Citations omitted). . . . The rule in question furthers a substantial governmental interest in that it attempts to restrict speech that would be prejudicial or deleterious to the administration of criminal justice.
>
> The ethical rule at issue in this case imposes restraints upon a limited class of persons - attorneys for the prosecution or defense in a pending criminal matter. These persons have a unique role and responsibility in the administration of criminal justice and, therefore, have an extraordinary power to undermine or destroy the efficacy of the criminal justice system. (Citations omitted). . . . [S]uch attorneys are appropriately subject to carefully tailored restraints upon their free speech."

The court ruled that the prohibition applied only to that speech which is "reasonably likely" to interfere with or affect a fair trial. We adopt the reasoning of the New Jersey court on this issue.

There is a further reason why in this State there is no unreasonable restraint placed on the freedom of speech rights of an attorney admitted to practice law in accordance with the rules governing such matters.

The preamble to the Code of Professional Responsibility states in pertinent part:

> "Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our le-

> gal system. A consequent obligation of lawyers is to maintain the highest standard of ethical conduct.
>
> In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the everchanging relationships of society.
>
> The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

Because it is occasionally necessary to remind ourselves of the rigorous standards each of us must maintain as a member of the legal profession, Sections 3.1 and 3.2 of Rule 9 of the Rules of this Court also bear repetition:

> 3.1. The license to practice law in this State is a continuing proclamation by the court that the holder is fit to be entrusted with professional and

judicial matters, and to aid in the administration of justice as an attorney and as an officer of the Court. It is the duty of every recipient of that privilege to conduct himself at all times, both professionally and personally, in conformity with the standards imposed upon members of the bar as conditions for the privilege to practice law.

3.2. Acts or omissions by an attorney, individually or in concert with any other person or persons, which violate the Attorney's Oath of Office, the Code of Professional Responsibility of the State of Tennessee, or T.C.A. §23-3-201, shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship.

In *Petition for Tennessee Bar Association*, 539 S.W.2d 805 (Tenn.1976), at p. 809 Justice Harbison of this Court has traced the disciplinary rules promulgated by this Court from their origin. Rule 40 of the Court, providing for the appointment of members of the bar to investigate grievances or complaints against lawyers charged with misconduct was published at 192 Tenn. 827 and subsequently readopted as Rule 42. By order dated July 19, 1965, this Court, *acting upon a petition of the Tennessee Bar Association*, set up commissioners for the purpose of investigating complaints of unethical conduct and professional misconduct on the part of attorneys. To implement enforcement of the standards of professional ethics and responsibility, the order of July 19, 1965 directly involved the Board of Governors of the Tennessee Bar Association and local bar associations, in the manner set out in detail in that rule. The use of investigative committee reports under Rule 42 has received express sanction by the General Assembly, now encoded in T.C.A. §23-3-202. In 1974, Rule 42 was revised at the behest of the Tennessee Bar Association. Instead of relying upon the voluntary efforts

of the Bar Association, local bar associations and individual lawyers, the Court chose a method by which the financing of grievance investigations and enforcement of professional standards would be shifted to the entire membership of the State's legal profession and upon all persons holding a license to practice law in this State, with the exceptions set out in the Rule. New rules of the Court were adopted in 1981 and Rule 42 was replaced by current Rule 9.

Although this Court exercises the role of prescribing and seeking to enforce and uphold the standards of professional responsibility in this State, *Petition of Tennessee Bar Assoc.*, supra, p. 810, the Court has extended to any member of the profession the right to file a petition, at any reasonable time, to ask the Court to reconsider or modify its actions.

The Hearing Committee as well as the trial judge in this case have indicated a need for more precise guidelines for interpreting the applicability of DR 7-107 to extrajudicial statements in criminal cases. The Hearing Committee in its findings made note of the three tests adopted severally by courts in various jurisdictions to be used in such cases, that is, whether comments of counsel posed:

> (1) "[A] serious and imminent threat; (2) "a clear and present danger;" or (3) "a reasonable likelihood," of interfering with the fair trial of a defendant.

We are of the opinion that the above differences are more semantical than real. We have no difficulty in finding adequate guidelines within the framework of the rule itself. Throughout the text constant reference is made to the statements a "reasonable person" might make, "reasonably likely" to interfere with a fair trial. The rule is explicit. There is no reason to complicate it by the addition of abstruse court inculcated definitions.

We have been greatly benefited in reaching the conclusions announced here by the briefs of amici curiae, Na-

tional District Attorneys Association, the Tennessee District Attorneys General Conference and the Tennessee Association of Criminal Defense Lawyers. We express our appreciation for their assistance.

Respondent's challenge to the constitutionality of Disciplinary Rule 7-107 is found to be without merit. The judgment of the Chancery Court for Davidson County finding respondent to be in technical violation of Disciplinary Rule 7-107(B) and (E) and sustaining the hearing committee's verdict is affirmed by this Court. The costs of these proceedings will be paid equally by the Board of Professional Responsibility and respondent.

CHARLES H. O'BRIEN, JUSTICE

CONCUR:
Harbison, C.J.,
Fones & Cooper, JJ.

Concurring in Part,
Dissenting in Part,
Drowota, J.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

S/C No. 87-47-I

IN RE: JOHN ZIMMERMANN,
An Attorney Licensed and admitted to the practice of Law in Tennessee,
Respondent-Appellant,

v.

BOARD OF PROFESSIONAL RESPONSIBILITY,
Appellant.

FOR PUBLICATION.

DAVIDSON CHANCERY
Hon. Aaron Brown, Chancellor.

CONCURRING AND DISSENTING OPINION

I concur in part and dissent in part. I agree with the majority opinion that DR 7-107 does not violate the freedom of expression rights secured by the United States and Tennessee Constitutions as applied in the present case. I disagree with the majority's finding that Respondent, John Zimmermann, was in technical violation of DR 7-107 and that "the discipline imposed [private reprimand] was adequate and appropriate." I further disagree with the majority when it states: 'We are of the opinion his [Zimmermann's] comments were not very well considered and, in order to avoid the possibility of violating an accused's constitutional rights, that it would be prudent for the District Attorney to review his 'open policy with the media' in relation to the nature of the comments his staff is encouraged to communicate."

DR 7-107 is entitled "Trial Publicity." Section (A) deals with extrajudicial statements made during the investiga-

tion of a criminal matter, Section (B) deals with extrajudicial statements made prior to trial, Section (D) deals with extrajudicial statements made during trial and Section (E) deals with extrajudicial statements made after trial and prior to the imposition of sentence. In this case we deal only with Sections (B) and (E).[1] Put in its simplest form, the technical violation of DR 7-107(B), as found by the majority in this case, is that a lawyer associated with the prosecution of a criminal matter, prior to commencement of trial, has made an extrajudicial statement that relates to: (4) the results of examinations or the refusal or failure of the accused to submit to examinations or tests, and (6)

---

[1] (B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement, that a reasonable person would expect to be disseminated by means of public communication, and that relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

any opinion as to the guilt or innocence of the accused, the evidence or the merits of the case.

The Board of Professional Responsibility filed charges against John Zimmermann, an Assistant District Attorney General in Davidson County, alleging that he made improper extrajudicial statements to the news media about two pending criminal cases, which I shall refer to as the Sheffield case and the Emmitt and Haynes case. The Sheffield case involved the murder of a quadriplegic veteran in a Nashville cemetery by Sheffield. At his preliminary hearing Sheffield's confession was introduced, where he admitted stabbing the victim, Campbell. After the preliminary hearing, Zimmermann was questioned by reporters from the *Nashville Banner* and WSM radio. TV reporters and cameramen were also present. The following article appeared in the *Nashville Banner* about the Sheffield case:

> "The medical examiner said (Campbell) was strangled, stabbed in the chest multiple times and had his throat slashed all the way across," Assistant District Attorney General John Zimmermann said.
>
> "The photographs of the body were pretty bad. We're considering asking for the death penalty," Zimmermann said today.
>
> Once at the cemetery, Sheffield allegedly stabbed the victim "multiple times in the chest and slashed his throat," Zimmermann said after Wednesday's preliminary hearing in General Sessions Court.

The following article also appeared in *THE TENNESSEAN:*

> Assistant Attorney General John Zimmermann said outside the courtroom that Sheffield, 19, told police he attempted to strangle Campbell, 52, but the older man "wouldn't die".

> Then, according to Zimmermann, Sheffield said he stabbed Campbell "multiple times in the chest" before slashing his throat, almost from ear to ear.

With reference to the Sheffield case, the Hearing Committee found that Sheffield's confession (which was truly prejudicial) had been introduced at the preliminary hearing, therefore it was of public record and Zimmermann's comments concerning the confession were permissible. *See* DR 7-107 (B)(3). The Committee, however, found Zimmermann's comments to the media concerning the examination and report of the medical examiner and photographs of the body were in violation of DR 7-107(B)(4).

I am of the opinion that Zimmermann's statements regarding the medical examiner's findings did not violate DR 7-107(B)(4). It should be pointed out that in the Sheffield case the cause of death was not a contested issue, nor was the medical examiner's description of the injuries disputed, and the medical report had no bearing on the guilt or innocence of Sheffield. The autopsy report is a public record, T.C.A. §38-7-110(C), and therefore, an attorney may state the medical examiner's findings. DR 7-107(B)(4) deals with "results of any examinations or tests or the refusal or failure of the *accused* to submit to examinations or tests" [emphasis added]. Section (B)(4) is meant to prevent comments about tests or refusal to submit to tests by the accused, not a victim. For example, the failure of a defendant to pass or to take a polygraph test cannot be commented upon, but here we have an examination of a victim, not the defendant. With reference to Zimmermann's statement that "the photographs of the body were pretty bad," the photographs were never displayed or offered to the media by Zimmermann, and they were, therefore, not disseminated to the public. The majority opinion fails to cite what specific rule prohibits such a statement by Zimmermann and how it threatened the Defendant's fair trial.

Emmitt and Haynes were convicted in separate jury trials of assault with intent to commit first degree murder, aggravated kidnapping, aggravated rape, armed robbery, and first degree burglary. The victim was an 82-year-old senior citizen volunteer worker. Before the sentencing hearing, the following statements were attributed to Zimmermann in a local newspaper:

> "I think these verdicts speak the mind of the jury for the community, in that crimes like this against the elderly are not going to be tolerated."
>
> ". . . will ask Judge Sterling Gray in a sentencing hearing . . . to impose the maximum sentences on both Emmitt and Haynes and to order those terms consecutively."
>
> "This woman suffered torture at the hands of these two men for about three hours . . . . As far as I am concerned, there is nothing worse they could have done short of killing her."

With reference to the Emmitt and Haynes case, the Hearing Committee determined there was no violation of DR 7-107(E) because it was not reasonably likely that Zimmermann's remarks had any effect on the imposition of the sentence in the case. Judge Gray testified at the disciplinary hearing that he was unaware of any extrajudicial statements made by Zimmermann and was not influenced by anything said or done by Zimmermann outside the courtroom.

Zimmermann's statements to the press were not a staged press conference, he did not initiate the discussion, he responded only to questions propounded to him by the news media representatives outside the courtroom. The policy of the District Attorney's office was to speak openly and courteously with all members of the press consistent with the code of professional responsibility. This John Zim-

mermann did and he should not now be reprimanded for his actions.

The majority opinion points out that "[t]he hearing committee as well as the trial judge in this case has indicated a need for more precise guidelines for interpreting the applicability of DR 7-107 to extrajudicial statements in criminal cases." The hearing committee noted three tests or standards adopted by courts in other jurisdictions which lend guidance in applying DR 7-107. The three tests are, whether extrajudicial statements of counsel posed: (1) a serious and imminent threat to the fair trial of a defendant, *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th cir. 1975) *cert. den.*, 427 U.S. 912 (1976);[2] (2) a clear and present danger in the fair trial of the defendant, *Markfield v. New York*, 40 App. Div.2d 516, 370 N.Y.S.2d 82 (1975); or (3) a reasonable likelihood of interfering with the fair trial of a defendant, *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979). The parties and Amici have asked this Court to give them and the Bar of this State some guidance for interpreting DR 7-107's applicability to extrajudicial statements. The majority opinion responds to the request by stating: "We have no difficulty in finding adequate guidelines within the context of the rule itself." This response by the majority that "[t]he rule is explicit", begs the question. To merely say that "[t]hroughout the text constant reference is made to the statements a 'reasonable person' might make, 'reasonably likely' to interfere with a fair trial," is not an adequate response to the guidance sought by the bench and bar. The citation to a "reasonable person" found in DR 7-107, Sections (A), (B), (D), (E), (G) and (H), has nothing to do with the extra-

---

[2] *See Ruggieri v. Johns-Manville Products Corp.*, 503 F.Supp. 1036 (R.I. 1980); *Bernard v. Gulf Oil Co.*, 619 F.2d 459, 476-477 (5th Cir. 1980) *en banc*; *Shadid v. Jackson*, 521 F.Supp. 85 (E.D. Tex. 1981); *In re: Lasswell*, 673 P.2d 855 (Or. 1983); *Kemner v. Monsanto Company*, 112 Ill.2d 223, 492 N.E.2d 1327, 1337 (1986).

judicial statement of counsel but refers to what "a reasonable person would expect to be disseminated by means of public communication." In this case there was an obvious expectation that Zimmermann's statements would be disseminated by means of public communication, since the media approached Zimmermann after the preliminary hearing and sought statements from him. The "reasonable person" reference in Section (B) has nothing to do with giving guidance to the bar concerning extrajudicial statements made prior to trial. The reference to "reasonably likely" in the majority opinion is not found in Section (B), therefore it is difficult to see how the rule can be said to be explicit.

The bench and bar have asked for guidance in interpreting DR 7-107's applicability to extrajudicial statements. I am of the opinion that we should adopt a standard which balances the rights of the accused to a fair trial with the right of a free press and the public's right to information and knowledge.

The majority opinion states "that it would be prudent for the District Attorney to review his 'open policy with the media' in relation to the nature of the comments his staff is encouraged to communicate." This reasoning by the majority is why I feel guidelines for DR 7-107(B) should be established by this Court. The majority opinion does what respondent seeks to avoid - a stifling of the public's right to know by creating a chilling effect on prosecutors with the suggestion to "review his 'open policy with the media' ". There is a delicate balance between a prosecutor's right to speak and the right of the public and the press to have access to information, and the rights of the individual accused of a crime and a defendant's right to a fair trial. I am of the opinion that Zimmermann's statements should be reviewed by the test of "whether his comments posed a clear and present danger to the fair trial of the defendant." Under such a test, it is clear that Zimmermann's statements to the media did not pose a

clear and present danger to the defendant's fair trial and he did not violate DR 7-107. I would reverse the decision of the Chancery Court recommending a private reprimand. I would dismiss the complaint filed by the Board of Professional Responsibility for I find no violation of DR 7-107.

FRANK F. DROWOTA, III, Justice.

APPENDIX B

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE - PART III

NO. 86-2120-III

IN RE: JOHN ZIMMERMANN,

Respondent.

FINDING

In the case at Bar, the Court, after a complete review of the record, referring to notes taken on testimony adduced in open Court, argument of counsel in the way of supplementing previous well-prepared briefs, the Court concludes the Respondent technically violated Disciplinary Rule 7-107 (B) and (E) in the Sheffield matter.

The Court further finds the Respondent's insistence that he is protected in making the statements attributed to him by the First Amendment to the Constitution is not tenable. The statements as printed definitely violated defendants constitutional right in violation of the 6th and 14th Amendment to the Constitution. "The 1st Amendment can be abridged if in direct conflict with the 6th and 14th Amendment." 522 F.2nd 248.

In the Haynes/Emmitt case the Court feels the Respondent also technically violated rule D.R. 7-107 (E), however, the Honorable Sterling Gray, the trial Judge in such case testified he was not aware of such remarks,and consequently not influenced by them.

Knowing the reputation of Judge Gray and the other trial Judges in the State it would be difficult for me to believe an ex-parte statement outside the Courtroom would

or could influence their decision, however the rule has been announced, promulgated and violated.

The Court got the impression, from the evidence that the District Attorney General, Honorable Tom Shriver, has in the past insisted upon a policy in his office of open and candid report to members of the press. As admirable that this approach might be, the Court got the further impression that neither the Attorney General, or his assistants were aware of the definite impact of the rules.

The Court is of the opinion at such time as there is a complete understanding of what is to be expected of the parties in position of representing the State in Criminal prosecution as directed by the Supreme Court, there will be no further reason for a disciplinary hearing involving the Attorney General's Office.

The Court feels the Respondent did not act maliciously or with the intent to interfere with a fair trial for Sheffield, or to influence Judge Gray in imposing a sentence in the Haynes Emmitt matter.

In conclusion the court taking all matters into consideration and especially reviewing the evidence adduced in open Court and the entire record, feel that neither party has carried the preponderance of evidence necessary to over-turn the hearing committee's verdict in the matter, therefore, the Court confirms their finding of the 22nd day of August, 1986, in its entire form.

Prepare decree in conformity with the finding herein and present for entry.

Done at Memphis, Tennessee this 7th day of April 1987.

_____

AARON C. BROWN
CHANCELLOR - BY DESIGNATION

cc: Honorable Joseph L. Mercer, II
Board of Professional Responsibility
1101 Kermit Drive - Suite 405
Nashville, TN 37217

Honorable William M. Leech, Jr.
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Clerk and Master
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APPENDIX C

IN DISCIPLINARY DISTRICT V
OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

DOCKET NO. 85-272-5

IN RE: JOHN ZIMMERMANN,
Respondent, An Attorney
Licensed and Admitted to the
Practice of Law in Tennessee

JUDGMENT OF THE HEARING COMMITTEE

This matter is before the Hearing Panel of the Board of Professional Responsibility of the Supreme Court of Tennessee upon a Petition for Discipline filed pursuant to Rule 9, Rules of the Supreme Court, against John Zimmerman. The Hearing Committee, consisting of Robert L. Echols, Chairman, Richard H. Dinkins, and Jack W. Robinson, submits its judgment in this cause in accordance with the following:

1. STATEMENT OF THE CASE

The Petition for Discipline was filed on December 5, 1985, and service of process was served on the Respondent by certified mail. The Answer of the Respondent was filed on January 8, 1986. Interrogatories were served upon the Respondent by mail on January 13, 1986, and Respondent's Answers to the Interrogatories were filed on February 19, 1986. This matter was set for hearing originally on May 13, 1986, but was continued at the request of counsel for the Respondent until June 16, 1986. At the hearing, the Respondent was represented by Mr. William M. Leech, Jr.

and Ms. Laurie A. Dollhofer. The disciplinary counsel was Joseph L. Mercer II.

The Petition for Discipline filed against the Respondent, an Assistant District Attorney General in Davidson County, Tennessee, alleges he made certain improper extra-judicial statements to representatives of the news media in violation of Disciplinary Rule 7-107(B) and (E). The charges refer to two pending criminal cases in Davidson County in which the Respondent was acting as prosecutor. In both cases the remarks were made in the hallway outside the courtroom while Respondent was being interviewed by representatives of the news media. There is no dispute as to the material facts in either case.

Respondent admits making the remarks attributed to him in the local newspapers and admits that the remarks were extra-judicial. He also admits that he expected his comments to be disseminated to the public by the media. Respondent states that the statements made by him did not violate the provisions of D.R. 7-107 and that he is protected in making such statements by the First Amendment.

THE SHEFFIELD MATTER

In June of 1984 a preliminary hearing was held in a case involving Larry Sheffield, an alleged male prostitute who was charged with a brutal first degree murder of a quadriplegic veteran in a Nashville cemetery. Immediately following the hearing, Respondent was questioned by several media reporters about the case. It is alleged that his remarks violated D.R. 7-107(B) in that they tended to inflame the passions of the public and made it difficult for Sheffield to receive a fair trial because of the prejudicial influence which the pre-trial publicity had upon potential jurors.

Specifically, the following statements were attributed to the Respondent by the local newspapers:

"Sheffield - told police he attempted to strangle Campbell . . . but (he) wouldn't die".

"Sheffield said he stabbed Campbell multiple times in the chest and slashed his throat."

"The medical examiner said (Campbell) was strangled, stabbed in the chest multiple times and had his throat slashed all the way across.

"The photographs of the lady were pretty bad. We're considering asking for the death penalty."

"Once at the cemetery, Sheffield allegedly stabbed the victim multiple times in the chest and slashed his throat."

THE HAYNES/EMMITT MATTER

In October of 1984 co-defendants Dwayne Haynes and Richard Emmitt were convicted in separate jury trials of assault with intent to commit first degree murder, aggravated kidnapping, aggravated rape, armed robbery, and first degree burglary. The victim was an 82 year old senior citizen volunteer worker. After the second trial (Emmitt) and before the sentencing hearing, Respondent spoke with representatives of the media about both cases. It is alleged that his remarks violated D.R. 7-107(E) in that it was reasonably likely that the statements could influence the imposition of the sentences to be given by the trial Judge in the pending cases.

The following statements attributed to the Respondent appeared the next day in a local newspaper:

"I think these verdicts speak the mind of the jury for the community, in that crimes like this against the elderly are not going to be tolerated."

". . . will ask Judge Sterling Gray in a sentencing hearing . . . to impose the maximum sentences

on both Emmitt and Haynes and to order those terms consecutively."

"This woman suffered torture at the hands of these two men for about three hours. . . . As far as I am concerned, there is nothing worse they could have done short of killing her."

THE HEARING

Judge Sterling Gray testified at the disciplinary hearing concerning the Haynes/Emmitt cases. He testified that he was unaware of any extra-judicial statements made by the Respondent in either case or of the comments of the Respondents which appeared in a local newspaper article following the Emmitt trial. Although he did impose sentences of 125 years, he was not influenced by anything said or done by the Respondent outside the courtroom. He further testified that Respondent was a competent, aggressive prosecutor and he was aware of no disciplinary violations committed by him.

Respondent's supervisor, District Attorney General Tom Shriver, testified at the disciplinary hearing that it was the policy of his office to be open and candid with all members of the press. He encouraged the Assistant District Attorneys on his staff to answer questions from the media within the permissible bounds of the disciplinary rules. He stated the remarks of the Respondent on matters contained in Sheffield's confession were permissible because the confession had been introduced in the preliminary hearing.

Respondent stated at the hearing that in the Sheffield case his comments were not designed to prejudice jurors and that he felt justified in commenting on matters which had been brought out in the prior preliminary hearing. He did not call a press conference and responded only to questions put to him by the news media representatives outside the courtroom. He believed he was following the

policy of the DA's office by being open and candid with the press. In the Haynes/Emmitt cases, Respondent stated he purposely waited until after trial (but before sentencing) to make any statement to the press so as to avoid the possibility of influencing the jury in the case. He did not intend to affect Judge Gray's decision regarding the sentences to be imposed and thought he was being careful about his extra-judicial statements by waiting until after the trial.

All witnesses were examined by counsel for the parties and the panel members.

CONCLUSIONS OF THE HEARING COMMITTEE

After having heard the testimony of witnesses, arguments of counsel and statements of the Respondent, and having reviewed the exhibits, briefs of counsel and the entire record in this cause, it is the conclusion of the Hearing Committee that the Respondent, John Zimmerman, has violated D.R. 7-107(B). The Respondent should receive a private reprimand for his extra-judicial comments made to representatives of the media in the Sheffield matter concerning the examination and report of the medical examiner and photographs of the body, neither of which had been introduced in the preliminary hearing. Since Sheffield's confession had been introduced at the hearing, it became a public record and Respondents' comments thereon were permissible.

With respect to the Haynes/Emmitt matter, Respondent's extra-judicial comments after the trial did not violate D.R. 7-107(E) because it was not reasonably likely that they would affect the imposition of sentence in the case.

In applying the rules of professional responsibility, there also must be a rule of reason applicable to their interpretation. There was no intent on the part of the Respondent to interfere with a fair trial for Sheffield or to influence

the sentence to be imposed by Judge Gray in the Haynes/Emmitt matter. He thought he was following the policy of his office in being accessible to the news media as expressed by General Shriver. When Respondent became aware that his extra-judicial comments in the Sheffield case had become the subject of a complaint to the Board of Professional Responsibility, he testified that he made no further statements to the press until the conclusion of the trial. In the Haynes/Emmitt matter, he intentionally did not comment to the media until after the trial was over (but before the sentencing). It is apparent that he wants to do what is right.

As a public prosecutor, Respondent has certain rights and responsibilities concerning the dissemination of public information. The disciplinary rules adopted by the Tennessee Supreme Court, however, place specific restrictions on all attorneys for the dissemination of information concerning pending criminal trials. Admittedly, it is a delicate balance between the right to a fair trial and the right of free expression.

As pointed out by counsel for the Respondent, several courts have held that the First Amendment of the Constitution requires a more restrictive interpretation of D.R. 7-107 in order to adequately protect the right of free speech. Basically, those courts have adopted one of three tests to be used in interpreting an attorney's extra-judicial comments under D.R. 7-107. The three tests differ with regard to the degree of threatened harm required before discipline can be imposed:

(1) Whether the comments posed a "serious and emminent threat" to the fair trial of a defendant;

(2) Whether the comments posed a "clear and present danger" to the fair trial of a defendant;

(3) Whether the comments posed a "reasonable likelihood" of interfering with the fair trial of a defendant.

Until the Tennessee Supreme Court amends the language of D.R. 7-107 or furnishes other guidelines for interpreting its applicability to extra-judicial statements in criminal cases, the Hearing Committee must look to the present provisions of the rule and the circumstances of each case. For the reasons stated herein, the Hearing Committee recommends a private reprimand in this case.

This 22nd day of August, 1986.

Robert L. Echols, Chairman

Richard H. Dinkins

Jack W. Robinson

FILED
MAY 16 1989
JOSEPH F. SPANIOL, JR
CLERK

No. 88-1707

(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN ZIMMERMANN,
Petitioner,

v.

BOARD OF PROFESSIONAL RESPONSIBILITY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

---

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment is violated by DR 7-107, as applied in imposing a private reprimand upon a prosecutor for revealing to the press, during two separate felony trials, matters that were not in the public record, when the state court determined that, on each occasion:

(i) his statements posed a "reasonable likelihood" of interfering with a fair trial or with the imposition of sentence, and

(ii) this "reasonable likelihood" test was the equivalent of tests which require a "serious or imminent threat" or a "clear and present danger."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

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JOHN ZIMMERMANN,

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v.

BOARD OF PROFESSIONAL RESPONSIBILITY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

---

BRIEF IN OPPOSITION

The Board of Professional Responsibility of the Supreme Court of Tennessee ("the Board"), the Respondent, respectfully submits this brief in opposition to the petition for writ of certiorari to the Supreme Court of Tennessee that was filed on April 20, 1989 by John Zimmermann, the Petitioner.

STATEMENT OF THE CASE

The Petitioner, John Zimmermann, is an Assistant District Attorney. He was disciplined by a private reprimand for two separate violations of Disciplinary Rule 7-107 of the Tennessee Code of Professional Responsibility.

The first violation occurred after the preliminary hearing and before jury selection in the murder trial of Larry

Sheffield. Mr. Zimmermann revealed to news reporters some gruesome details of the victim's injuries, which were not matters of public record.

The second violation occurred before sentencing in the trial of Dwayne Haynes and Richard Emmett for a number of violent felonies. Mr. Zimmermann revealed to news reporters his opinion about the seriousness of the crimes and his intention to ask for the maximum sentence.

The public defender filed complaints with the Board of Professional Responsibility about both of these incidents. A three-lawyer Hearing Panel found that Zimmermann's statements in the Sheffield case violated DR 7-107, but that his statements in the Haynes/Emmett case did not. The Panel recommended a private reprimand.

Zimmermann appealed to the Chancery Court, which conducted a trial *de novo*. The court found that Zimmermann violated DR 7-107, both in the Sheffield case and in the Haynes/Emmett case. The court affirmed the imposition of a private reprimand.

Zimmermann appealed to the Tennessee Supreme Court. The court affirmed by a vote of 4 to 1.

REASONS WHY PETITION SHOULD BE DENIED

This case is not appropriate for review by this Court, for the following reasons.

I. The Petition Attempts To Relitigate, In This Court, A Question Of State Law Concerning The Definition Of "Public Records."

The petition asserts that Mr. Zimmermann's statements consisted of information that was already available to the public. Pet., pp. i, 10. By raising the "public records" issue in this Court, Zimmermann evidently proposes to relitigate the issue here. That issue is, however, a matter of state law which has already been determined

by the Tennessee Supreme Court. It is not an appropriate issue for this Court to review.

The "public records" issue was litigated in all three tribunals that considered this case. In each tribunal, Zimmermann asserted that his statements were permitted by DR 7-107(C), which allows attorneys to quote from "public records of the court in the case." Zimmermann based this defense on his private viewing of a handwritten draft of the autopsy report in the Sheffield case, before the report had been finalized or lodged with a public records custodian.

In each tribunal the Board argued, to the contrary, that the "record" in question was not a "public record of the court in the case" at the time Zimmermann revealed its contents to the news media. Each tribunal found that Zimmermann's statements violated DR 7-107. These findings necessarily reject Zimmermann's "public records" defense. The "public records" issue is a matter of state law that has been fully litigated and authoritatively determined in the state courts. It is unsuited for review by this Court.

II. The Petition Attempts To Litigate, In This Court, An Issue That Was Expressed Only As Dictum In The Tennessee Supreme Court's Opinion.

The petition challenges the suggestion, in the majority opinion of the Tennessee Supreme Court, that the District Attorney review his "open policy with the media." Pet., pp. 24-25, referring to Tennessee Supreme Court Opinion, Pet., pp. 7a, 20a.

This portion of the court's opinion is clearly *dictum*. The District Attorney, an elected public officer, is Mr. Zimmermann's employer and supervisor. The District Attorney was not a party to this litigation and is clearly not bound by the court's *dictum* in this case. The *dictum* addressed to the District Attorney by the state court is not appropriate for review by this Court.

III. The Tennessee Supreme Court Was Unanimous In Its Rejection Of The Constitutional Challenge Raised Here.

The four Justices who joined the majority opinion of the Tennessee Supreme Court clearly rejected Mr. Zimmermann's challenge to the constitutionality of DR 7-107 as applied in this case.

The remaining member of the court, Justice Drowota, wrote a separate opinion, concurring in part and dissenting in part. Justice Drowota concurred in the majority's holding that DR 7-107, as applied in this case, does not violate the United States or Tennessee Constitution. Pet., p. 14a. The petition is clearly wrong in asserting that Justice Drowota found DR 7-107 unconstitutional. Pet., p. 13. In fact, the Tennessee Supreme Court was unanimous in rejecting Zimmermann's constitutional challenge to DR 7-107 as applied in this case.

Justice Drowota's dissent was based, not on constitutional grounds, but on his conclusion that Zimmermann had not violated DR 7-107. Pet., p. 14a. In reaching this conclusion, Justice Drowota gave DR 7-107 a more permissive interpretation than did the majority. Justice Drowota's opinion also implies that he was influenced by Zimmermann's "public records" defense. Pet., p. 17a. The division of the court on these issues is purely a matter of state law, presenting no federal question for this Court to review.

Justice Drowota's dissent also took issue with the suggestion included in the majority opinion, to the effect that the District Attorney should review his "open policy with the media." Pet., pp. 14a, 20a. As indicated above, the majority's suggestion on this matter is merely *dictum*. Consequently, the court's division on this matter presents no federal question for this Court to review.

IV. The Tennessee Supreme Court's Decision Is Correct On The Merits Of The Constitutional Issue.

The Tennessee Supreme Court correctly held that DR 7-107 is constitutional, as applied to the facts of this case. The court found that Mr. Zimmermann's statements posed a "reasonable likelihood" of interfering with a fair trial in the Sheffield case, and with the imposition of sentence in the Haynes/Emmett case. Pet., p. 12a.

Some courts perceive a constitutionally significant difference between this test and other formulations, such as "serious and imminent threat" or "clear and present danger." See, for example, the conflict on this issue between *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) ("serious and imminent threat") and *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) ("reasonable likelihood"), both discussed later in this brief. Other courts have concluded that the distinction is merely semantic. See *In re Lasswell*, 296 Or. 121, 673 P.2d 855 (1983); *Markfield v. Association of Bar of City of New York*, 49 A.D.2d 516, 370 N.Y.S.2d 82 (N.Y. App. Div.), *app. dismissed* 37 N.Y.2d 794, 337 N.E.2d 612 (N.Y. 1975); Note, *A Constitutional Assessment of Court Rules Restricting Lawyer Comment on Pending Litigation*, 65 Cornell L. Rev. 1106 (1980).

The Tennessee Supreme Court, in the case at bar, subscribed to the latter view, that the distinction among the various verbal formulations is merely semantic. Pet., p. 12a. Thus, by finding that Mr. Zimmermann violated DR 7-107 as interpreted by the "reasonable likelihood" test, the court necessarily found that Zimmermann violated DR 7-107 as interpreted by the other two tests as well—"serious and imminent threat" and "clear and present danger." As a result of this finding, the court's decision is constitutionally correct, so long as at least one of the three tests passes constitutional muster.

V. The Tennessee Supreme Court's Decision Does Not Directly Conflict With Other Cases.

The petition fails in its attempt to demonstrate direct conflict between the Tennessee Supreme Court's decision and other cases. The petition does not cite and the Board is not aware of any precedent, from this Court or any other, that would clearly confer First Amendment protection upon Mr. Zimmermann based on the facts found in this case. These facts are, in summary, that Mr. Zimmermann spoke to news media while he was serving as prosecuting attorney in sensational felony cases; his statements are not excused by the "public records of the court" exception; his statements were highly inflammatory; his statements (in the Sheffield case) were made before jury selection and they were made to news reporters in the county where jurors would be selected; his statements (in the Haynes/Emmett case) were made before sentencing.

Most of the cases cited in the petition deal with First Amendment issues in settings that are clearly distinguishable from this case. First, the petition cites "contempt by publication" cases in which news media were the parties. *Bridges v. California*, 314 U.S. 252 (1941); *Craig v. Harney*, 331 U.S. 367 (1947); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Pennekamp v. Florida*, 328 U.S. 331 (1946). These cases, dealing with freedom of the news media, do not control the case at bar, which is a matter of attorney discipline.

The petition also cites *Wood v. Georgia*, 370 U.S. 375 (1962), arising from a contempt citation against a sheriff. Again, *Wood* does not involve attorney discipline and is therefore not relevant here.

Next, the petition relies on "gag order" cases, some arising in civil litigation, others in criminal litigation. After listing these cases, this brief will indicate why they are not directly relevant here.

The civil gag order cases cited in the petition are *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93 (3d Cir. 1988) (gag order addressed to parties, not counsel); *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980), *aff'd*, 452 U.S. 89 (1981) (parties and counsel); *Kemner v. Monsanto Co.*, 112 Ill.2d 223, 492 N.E.2d 1327 (1986) (parties and counsel); *Ruggieri v. Johns-Manville Products Corp.*, 503 F. Supp. 1036 (D.R.I. 1980) (counsel); *Shadid v. Jackson*, 521 F. Supp. 85 (E.D. Tex. 1981) (counsel).

The other gag order cases cited in the petition arose in criminal litigation. *Levine v. United States District Court*, 764 F.2d 590 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986) (defense counsel); *United States v. Ford*, 830 F.2d 596 (6th Cir. 1987) (defendant); *United States v. Lehder-Rivas*, 669 F. Supp. 1563 (M.D. Fla. 1987) (injunction to restrain defendant in criminal case from preparing profile of potential jurors shortly before jury selection); *United States v. Marcano-Garcia*, 456 F. Supp. 1354 (D.P.R. 1978) (defendant).

The gag order cases—whether civil or criminal—are not directly relevant here, because (i) gag orders are enforceable by the court's contempt power, (ii) they must be narrowly tailored in view of the specific circumstances of each pending case, and (iii) they often involve restraints against the news media, parties and witnesses, rather than being limited to attorneys. As a result, the standards that apply in gag order cases should not necessarily control in disciplinary proceedings against attorneys. The gag order cases that arose in civil litigation are the furthest removed from relevance here, because the litigants in those cases do not enjoy the full range of constitutional protections conferred upon defendants in criminal cases.

The petition cites *Sheppard v. Maxwell*, 384 U.S. 333 (1966) which reversed a criminal conviction, in part because of prejudicial publicity which the trial court should

have prevented. The petition asserts that *Sheppard* adopts no standard, Pet., p. 16. In fact, however, this Court expressed the "reasonable likelihood" standard in that case, 384 U.S. at 363. Further, *Sheppard* involved post-conviction relief, an issue which is distinguishable from attorney discipline. For example, *State v. Biegenwald*, 106 N.J. 13, 524 A.2d 130 (1987) held that the prosecuting attorney had seriously violated DR 7-107 in a murder trial, but that these violations had not caused enough prejudice to require a new trial. A similar result was reached in *State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985), *cert. denied*, 474 U.S. 1110 (1986).

The petition also cites *Committee on Legal Ethics v. Douglas*, 370 S.E.2d 325 (W. Va. 1988), a disciplinary proceeding against an attorney who was a party to a transaction being investigated by two judges in a non-trial setting. The attorney published intemperate statements together with a photograph of himself, costumed and identified as a "Rambo"-type character resisting the judges. At issue was the constitutionality, as applied to those facts, of DR 1-102(A)(5), which prohibits an attorney from engaging in "conduct prejudicial to the administration of justice." The court noted that DR 7-107 was not at issue, since that provision applies only to statements made by attorneys during trials, and the *Douglas* case arose in a non-trial setting. Accordingly, *Douglas* is readily distinguishable from the case at bar.

The petition points out the apparent conflict between the "serious and imminent threat" test announced in *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) and the "reasonable likelihood" test approved in *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979). Both cases arose on pre-enforcement review of DR 7-107, a type of review that this Court subsequently discouraged in *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982). Since neither *Chicago Council*

nor *Hirschkop* contains any factual finding, their significance as precedent is limited, and the conflict between their verbal formulations may indeed be, as the Tennessee Supreme Court held in the case at bar, "more semantical than real." Pet., p. 12a.

The remaining cases cited in the petition are relevant to some extent, but they completely fail to demonstrate the direct conflict claimed by petitioner. *In re Lasswell*, 296 Or. 121, 673 P.2d 855 (1983) arose from a prosecutor's statements to the press concerning a pending criminal matter. The court formulated its own test, based to a considerable extent upon the Oregon constitutional guarantee of free speech. The court equated this test with both the "reasonable likelihood" test and the "serious and imminent threat" test and found that, under any of these tests, the prosecutor had not committed a violation.

In re Keller, 213 Mont. 196, 693 P.2d 1211 (1984) arose from out-of-court statements by counsel for the defendant in a criminal case. The court declined to enforce DR 7-107. The court was at the same time considering whether to revise its disciplinary rules by adopting the Model Rules of Professional Conduct. Within a few months after deciding *Keller*, the same court adopted the Model Rules, including Rule 3.6 which prohibits an attorney from making an out-of-court statement creating a "substantial likelihood of material prejudice." *Two More States Adopt Versions of the Model Rules: Montana*, 1 ABA/BNA Lawyer's Manual on Professional Conduct 855 (July 10, 1985). The combined impact of *Keller* and the same court's new rule creates no conflict with the Tennessee Supreme Court's opinion.

The petition cites *In re Rachmiel*, 90 N.J. 646, 449 A.2d 505 (1982). The Tennessee Supreme Court noted that *Rachmiel* presented "strikingly similar circumstances" to the case at bar. Pet., p. 8a. *Rachmiel* involved out-of-court statements by a former prosecutor. The New Jer-

sey court, applying the "reasonable likelihood" test, found the statements improper but withheld sanctions, partly because of some uncertainty as to whether the attorney was "associated" with the prosecution of the case, and partly because of the lack of precedent.

Markfield v. Association of Bar of City of New York, 49 A.D.2d 516, 370 N.Y.S.2d 82 (N.Y. App. Div.), *app. dismissed*, 37 N.Y.2d 794, 337 N.E.2d 612 (1975), also cited in the petition, arose from statements made by counsel in a criminal case, as a participant in a radio panel program on prison rebellions. Observing that DR 7-107(D) would pass constitutional muster under either the "reasonable likelihood" or the "clear and present danger" test, the court held that the attorney had not violated the rule.

The above analysis of all cases cited in the petition demonstrates no direct conflict with the decision of the Tennessee Supreme Court.

CONCLUSION

For these reasons, the Court should deny the petition for writ of certiorari.

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No. 88-1707

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN ZIMMERMAN,

Petitioner,

v.

BOARD OF PROFESSIONAL RESPONSIBILITY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

BRIEF OF AMICUS CURIAE, TENNESSEE PRESS ASSOCIATION

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BRIEF OF AMICUS CURIAE

INTERESTS OF THE TENNESSEE PRESS ASSOCIATION

The Tennessee Press Association, Inc. (hereinafter TPA), is a corporation existing pursuant to the laws of the State of Tennessee. It has its origin in an association of newspapers founded in 1869. This association of newspapers continued until its corporate existence was created and chartered in 1941.

The TPA represents substantially all of the daily or weekly paid subscription newspapers in the State of Tennessee. It has 139 member newspapers.

The TPA, through its Board of Directors, is vitally interested in the First Amendment and the preservation of rights and privileges accorded thereunder.

It has initiated litigation and become an intervenor in other litigation, both within the State of Tennessee and before the Sixth Circuit United States Court of Appeals, in situations where the facts and circumstances indicated a substantial First Amendment issue existed.

In this Cause, with approval of the parties, TPA offers its support for the Petitioner, John Zimmerman, in his request for a writ of certiorari, believing that the issues raised in the Tennessee tribunals have a direct, imminent and serious impact upon First Amendment rights and privileges enjoyed by the media within Tennessee.

The TPA, therefore, has a vital interest in seeking the review of the decision of the Tennessee Supreme Court which, if left undisturbed, would continue a pattern of constitutionally impermissible suppression of expression protected by the First Amendment and have a chilling effect upon members of the Bar, thus suppressing protected as well as unprotected speech and expression.

ARGUMENT: REASONS FOR GRANTING PETITION

THE PRESS HAS A VIABLE AND VALUABLE ROLE WITHIN THE CONSTITUTIONAL SYSTEM OF THE UNITED STATES WHICH IS FRUSTRATED BY THE DECISION BELOW.

Implicit in the constitutional history of the United States and more recently in decisional law is the proposition that a free society remains that way because of the confidence of its citizens in the government. This confidence and trust in government is enhanced and furthered by a dissemination under free and fair

circumstances of the widest possible array of information to the citizens.

The United States Supreme Court, writing against the backdrop of a particularly egregious set of facts constituting what was determined to be a blatant denial of due process, nonetheless recognized:

> . . . Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." *Pennekamp v. Florida*, 328 U.S. 331, 347, 90 L.Ed. 1295, 1303, 66 S.Ct. 1029 (1946); *Sheppard v. Maxwell*, 384 U.S. 333, 16 L.Ed.2d 600, 86 S.Ct. 1507 (1966).

The same philosophy was recognized in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 65 L.Ed.2d 973, 100 S.Ct. 2814 (1980), as follows:

> . . . Jeremy Bentham not only recognized the therapeutic value of open justice but regarded it as the keystone. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance. 1 J. Bentham, Rationale of Judicial Evidence 524 (1927). *Richmond Newspapers*, 448 U.S. 555, 569, 65 L.Ed.2d 973, 984-985.

It is enticing to assume that the First Amendment addresses only the right of speech. Were that true, the full freedom of expression recognized in this coun-

try would have long since been denied. As important as the right to speak freely may be, other rights involving the exchange of information occupy equally important positions within the protection of the First Amendment.

> . . . [T]he First Amendment goes beyond the protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. *First National Bank of Boston v. Belotti*, 435 U.S. 765, 783, 55 L.Ed.2d 707, 98 S.Ct. 1407 (1978). Free speech carries with it some freedom to listen. In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.' *Kleindienst v. Mandel*, 408 U.S. 753, 762, 33 L.Ed.2d 683, 92 S.Ct. 2576 (1972) . . . For the First Amendment does not speak equivocally. . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow. *Bridges v. California*, 314 U.S. 252, 263, 86 L.Ed. 192, 62 S.Ct. 190, 159 ALR 1346 (1941). . . .
>
> It is not crucial whether we describe this right to attend criminal trials to hear, see and communicate observations concerning them as a 'right of access,' . . . (citations omitted) or a 'right to gather information,' for we have recognized that without some protection for seeking out the news, freedom of the press would be eviscerated . . . (cita-

tions omitted). *Richmond Newspapers*, supra, 448 U.S. 555, 575-576.

As we have repeatedly demonstrated in the United States and as recognized by the United States Supreme Court in *Richmond Newspapers, supra,* people in an open society are not demanding of infallibility from their government or its institutions. They have a hard time, however, accepting what they cannot observe. *Id.* 448 U.S. 555, 572.

Directly relevant to the above recognized constitutional guarantees is the potential impact of the Tennessee Supreme Court's interpretation of Disciplinary Rule 107 (hereinafter DR 7-107). Recognizing the legitimate right of the Tennessee Supreme Court to regulate the practice of law and the legitimate concern it has to safeguard the rights of the criminal accused and the integrity of our judicial system and the adversary process which we enjoy, there are still permissible statements as well as other forms of expression which may legitimately be utilized by attorneys in providing necessary information to the public through the media concerning the judicial process, the administration of justice and the function of the officers and officials concerned therewith. To the extent that any prohibition against speech is overreaching or overbroad, it stifles and restricts permitted expression and, by painting with a broad brush, deprives the citizens of information to which they are otherwise entitled.

THE DECISION BELOW IS OVERLY RESTRICTIVE GIVEN THE JUDICIAL RECOGNITION THAT PUBLICITY AND THE DISSEMINATION OF INFORMATION TO PROSPECTIVE JURORS IS NOT PRIMA FACIE IMPROPER

In *Irvin v. Dowd*, 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639 (1961), the United States Supreme Court reversed the conviction of "mad dog Irvin" because of overwhelming juror prejudice created in part by massive prejudicial pre-trial publicity. In determining that there was clear and convincing evidence of prejudice, the Supreme Court nonetheless noted:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interests of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of the prospective jurors impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based upon the evidence presented in the court. *Spies v. Illinois*, 123 U.S. 131, 31 L.Ed. 80, 8 S.Ct. 21, 22; *Holt v. United States*, 218 U.S. 245, 54 L.Ed. 1021,

31 S.Ct. 2, 20 Ann Cas 1138; *Reynolds v. United States* (US), supra.

Subsequently, in 1963, Mr. Justice Clark observed in his dissenting opinion in *Rideau v. Louisiana*, 373 U.S. 723, 10 L.Ed.2d 663, 83 S.Ct. 1417 (1963):

> The right to a trial before a fair and impartial tribunal "is a basic requirement of due process," *Re Murchison*, 349 U.S. 133, 136, 99 L.Ed. 942, 946, 75 S.Ct. 623 (1955), and must be safeguarded with vigilance. As we recognized in Irvin, however, it is an impossible standard to require that tribunal to be a laboratory, completely sterilized and freed from any external factors . . .

Thus, not every expression of fact or opinion as to guilt or innocence reaching the prospective jurors or other information which causes a potential predisposition in their mind is constitutionally repugnant. In order to be constitutionally impermissible, the information disseminated or the form of its dissemination must be such as to create an opinion that cannot be set aside. To simply assume that this has occurred based upon publicity or the *potential for publicity* is error.

> We have noted earlier that pre-trial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial. The decided cases 'cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively

> deprives the defendant of due process.' *Murphy v. Florida*, 421 U.S. 799, 44 L.Ed.2d 589, 95 S.Ct. at 2031; *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 565, 49 L.Ed.2d 683, 701, 96 S.Ct. 2791 (1976).

THE DECISION BELOW CONFLICTS WITH THE FIRST AMENDMENT BECAUSE IT PERMITS THE IMPOSITION OF RESTRICTIONS ON SPEECH UNDER LESS STRICT STANDARDS THAN CONSTITUTIONALLY RECOGNIZED.

A. Standards in Press Access Cases

It is an accepted constitutional principle that prior restraints are not favored under the First Amendment. This is such a fundamental principle in our law that it should be accepted without the necessity of citation. These prior restraints may take the form of express legislative prohibitions, implied restrictions brought about through fear of sanction or reprisal or judicial order.

> Although the right of access to criminal trials is of constitutional stature, it is not absolute. See *Richmond Newspapers, Inc. v. Virginia*, supra, at 581, n 18, 65 L.Ed.2d 973, 100 S.Ct. 2814 (plurality opinion); *Nebraska Press Assn. v. Stuart*, 427 U.S. at 570, 49 L.Ed.2d 683, 96 S.Ct. 2791. But the circumstances under which the press and public can be barred from a criminal trial are limited. That state's justification in denying access must be a weighty one. Where, as in the present case, the state attempts to deny the right of access in order to inhibit the disclosure of sensitive information, *it must be shown that the denial is necessitated by a compelling gov-*

> *ernmental interest, and is narrowly tailored to serve that interest. . . .* (citations omitted) (emphasis added) *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606, 73 L.Ed.2d 248, 257, 102 S.Ct. 2613 (1982).

Prior to the decision in *Globe Newspaper Co.*, supra, it had been previously observed in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 558, 559, 49 L.Ed.2d 683, 697, 96 S.Ct. 2791 (1976):

> . . . Any prior restraint on expression comes to this Court with a heavy 'presumption' against its constitutional validity.
>
> * * *
>
> The thread running through all of these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.

Restrictive orders are not the only vehicle by which free speech can be limited. The chilling effect on free speech brought about by the threat of sanction was recognized in *Nebraska Press Assn.*, supra, in the following language:

> . . . If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time.
>
> . . . The damage can be particularly great when prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protec-

> tion against subsequent punishment (citations omitted) . . . Id., 427 U.S. 539, 559.

B. Contempt Cases

The United States Supreme Court has consistently used the "clear and present danger" standard to judge the constitutionality of contempt actions arising from out of court statements made during ongoing judicial proceedings. In a series of decisions beginning in the 1940's, This Court first addressed the indirect or constructive contempt issue based upon out of court statements as they related to pending litigation.

In *Bridges v. California*, 314 U.S. 252, 86 L.Ed. 192, 62 S.Ct. 190 (1941), Mr. Justice Black, writing for the majority of the Court, noted that the pending case rule regarding contempt judgments involving out of court statements and publications produced restrictive results at a time when public interest should be at its highest.

> It must be recognized that public interest is more likely to be kindled by a controversy over the event of the day than by a generalization, however penetrating, of a historian or scientist. Bridges, supra, 314 U.S. 252, 268, 86 L.Ed. 201, 206.

Thus to punish utterances during the pendency of litigation produces a ban on speech not only at a crucial time but on the most important topics of discussion. The right of free speech must be weighed against the interference with the administration of justice which the exercise of that right may produce.

> . . . the likelihood, however great, that a substantive evil will result cannot alone justify

> a restriction upon freedom of speech or the press. The evil itself must be "substantial." Brandeis, J. concurring in *Whitney v. California*, 274 U.S. 357, 376, 71 L.Ed 1095, 1105, 47 S.Ct. 21 (1887); it must be "serious", *id.* and even the expression of "legislative preferences or beliefs" cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Bridges v. California*, supra, 314 U.S. 262, 86 L.Ed 203.

In Bridges, Justice Black described the emergence from the clear and present danger cases of a workable principle providing that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.

> . . . the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech or the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow. *Bridges vs. California*, 314 U.S. 263, 86 L.Ed 203.

Five years later, in *Pennekamp v. Florida*, 328 U.S. 331, 90 L.Ed. 1295, 66 S.Ct. 1092 (1946), the United States Supreme Court observed:

> Without a free press, there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in that light and in

> that light applied. The independence of the judiciary is no less a means to the end of a free society, and the proper functioning of an independent judiciary puts the freedom of the press in its proper perspective. For the judiciary cannot function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the court. . . . A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other; but are indispensible to a free society.

The vehemence of the language or the passion and fire which is kindled by that language is not the sole measure of the appropriateness of the use of contempt power to punish its utterance. As observed in *Craig v. Harney*, 331 U.S. 375-377, 91 L.Ed. 1550, 1552, 67 S.Ct. 1249 (1947):

> The danger must not be remote or even probable. It must immediately imperil.

It is respectfully submitted that the four step analysis found in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 56 L.Ed.2d 1, 98 S.Ct. 1535 (1978), is the correct and appropriately applicable standard when judging whether sanctions or punishment are to be imposed as a result of extrajudicial statements or comment. This test requires a review of the interest of the government in the restriction, whether or not there is an imminent threat to the governmental interest to be protected, the likelihood of immediate harm and the restriction on the public's

comment necessary to secure that protection. No such standard or test was suggested by the Tennessee Supreme Court.

One of the best summaries of the appropriate standards to be applied when judging comment is found in *Landmark Communications, Inc. v. Virginia*, supra, 435 U.S. 829, 845, 56 L.Ed.2d 14, wherein Chief Justice Burger observed:

> In a series of cases raising the question of whether the contempt power could be used to punish out of court comments concerning pending cases or grand jury investigations, this court has consistently rejected the argument that such commentary constituted a clear and present danger to the administration of justice. See *Bridges v. California*; *Pennekamp v. Florida*; *Craig v. Harney*; *Wood v. Georgia*. What emerges from these cases is the "working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished," *Bridges v. California* (cites omitted), and that a "solidity of evidence," *Pennekamp v. Florida* (cites omitted), is necessary to make the requisite showing of imminence. "The danger must not be remote or even probable; it must immediately imperil." *Craig v. Harney* (cites omitted).

THE DECISION BELOW ITSELF CONFLICTS IN ITS TERMS WITH THE FIRST AMENDMENT PRINCIPLES ABOVE RECITED.

The Petitioner, John Zimmerman, an Assistant District Attorney General for Davidson County, Tennes-

see, was charged by a Metropolitan Nashville Public Defender with the violation of DR 7-107 and various of its subparts. These allegations arose out of extra-judicial statements made by the Petitioner in two cases. One statement was made to a group of media representatives outside the courtroom following a preliminary hearing and the second was made following trial and adjudication of guilt but before a sentencing hearing for the convicted accused.

In neither case did the attorney for the Defendant apply to the Court for sanctions or apply to the Court for any form of remedy such as continuance, change of venue or restrictive order. About this there is no controversy.

In the course of the proceedings either before the Hearing Committee of the Disciplinary Board or in the Chancery Court for Davidson County to which the first appeal was taken, both trial judges offered testimony. Neither judge felt that there had been any negative effect upon the rights of the criminal accused as a result of the statements made by the Petitioner, Zimmerman.

In responding to the inquiry of the press in both instances, Mr. Zimmerman was simply following the policy of the District Attorney which was one of openness with the media.

The Tennessee Supreme Court observed:

> . . . The purpose of the sanctions under the Disciplinary Rules is to discipline, not to punish. *Zimmerman vs. Board of Professional Responsibility*, 764 S.W.2d 757, 761 (Tenn. 1989).

The threat of discipline (which may include loss of license) for exceeding the bounds of DR 7-107 is sufficient to establish a chilling effect upon speech and expression. The majority opinion observes:

> . . . We are of the opinion his comments were not very well considered and, in order to avoid the possibility of violating an accused's constitutional rights, that it would be prudent for the District Attorney to review his "open policy with the media" in relation to the nature of the comments his staff is encouraged to communicate. *Id.* 764 S.W.2d 757, 760-761.

The above language from the majority opinion illustrates succinctly and without need for elaboration the potential for the chilling effect so negative to the First Amendment. The Court did not observe that the comments constituted a "clear and present danger" or were an "imminent threat." It simply observed they were "not very well considered" and the Court indicated that they should be suppressed to avoid the "possibility" of violating an accused's constitutional rights. It is respectfully submitted that this falls far short of constitutional requirements.

The Tennessee Supreme Court adopted a "reasonable likelihood" standard. Such a standard is easy to adopt because it has a similarity to the "reasonable man" rule which permeates tort litigation. It falls readily to the judicial pen and may be readily understandable by the lower courts. However, such a standard, it is respectfully submitted, is constitutionally deficient because its application risks self censorship and the chilling effect on expression brought

about by the threat of discipline such as that suffered by Mr. Zimmerman. This constitutional deficiency is particularly visible when, as in this case, there is *absolutely no demonstration* of any negative consequences flowing from the utterances of Mr. Zimmerman as reported by the media.

It is respectfully submitted that Justice Drowota, in his dissent, properly enunciates the standards which should be applied to the interpretation of DR 7-107 in Tennessee.

> . . . There is a delicate balance between a prosecutor's right to speak and the right of the public and the press to have access to information, and the rights of the individual accused of a crime and a defendant's right to a fair trial. I am of the opinion that Zimmerman's statements should be reviewed by the test of 'whether his comments posed a clear and present danger to the fair trial of the defendant.' Under such a test, it is clear that Zimmerman's statements to the media did not pose a clear and present danger to the defendant's trial and he did not violate DR 7-107. *Zimmerman, supra,* 764 S.W.2d 757, 766.

CONCLUSION

The decision of the Tennessee Supreme Court below conflicts with applicable constitutional law and it is essential that this conflict be resolved promptly in order to avoid the potential for harm flowing to all parties which will result from this conflict.

Respectfully submitted.

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